

# The Right of the State to Appellate Review in Criminal Cases

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Courts frequently stand in ill repute today for their part in the failure of the administration of criminal justice. All too often a person generally conceded to be guilty is set free, aided and abetted, it seems to the layman, by the law itself. It is a standard criticism of courts that they have failed to adapt their rules to modern settings. In the field of criminal law this is particularly true. In the course of a criminal trial if error intervenes which is prejudicial to the defendant, he can have this corrected by a reviewing court. If similar error occurs, prejudicial to the prosecution, and the defendant is acquitted because of it, no appeal can be had by the prosecution. Knowing this, the trial court will naturally incline his rulings in favor of the defendant, for no court wants to incur the danger of reversal. The prosecuting attorney must move with caution for fear of making a mistake which will cause a reversal in an appellate court. The defense attorney is impeded by no such fear.

Considered as an original proposition, in a day when there seems to be more danger the guilty will escape than that the innocent will be punished, a rule, which permits a defendant to have an appellate review but denies it to the state, might not achieve the following in the courts that this one has. The rule has been attacked by judges and writers.<sup>1</sup> The rule seems to be based on precedent and on reasons having little factual basis at the present time. Assuming that there is a need of re-examination of the rule, we shall consider the Ohio law on the point.

## I. MAY THE STATE PROSECUTE ERROR TO THE COURT OF APPEALS TO REVERSE THE JUDGMENT BELOW?

The overwhelming numerical weight of authority in this country holds that a state has no right to a writ of error after

<sup>1</sup> 35 Yale Law Journal, 674; 36 Yale Law Journal, 486.

a judgment in favor of the defendant in a criminal case, except in accordance with express statutes, whether that judgment was rendered upon verdict of acquittal, or upon determination by the court of a question of law.<sup>2</sup> From this view there is, however, a dissent holding that the state does have such right even in the absence of statute.<sup>3</sup> Prior to 1912 the majority rule was followed in Ohio cases holding that the statutes providing for appellate review in criminal cases did not apply to review sought by the state.<sup>4</sup> Before 1912 all appellate jurisdiction was statutory, but since the adoption of constitutional amendments in that year, jurisdiction of the Court of Appeals and of the Supreme Court is provided by the constitution so that the legislature cannot add to, or detract from, it.<sup>5</sup>

Article IV, Section 6 of the Ohio Constitution confers on the Court of Appeals jurisdiction ". . . to review, affirm, modify or reverse the judgments of the Courts of Common Pleas." It has been held that the Court of Appeals may, under the power conferred by this section, review *all* judgments of the Court of Common Pleas,<sup>6</sup> but the case so holding was not a criminal one.

There are two Supreme Court cases in Ohio holding by way of dicta that the state may prosecute error to the Court of appeals under proper circumstances. In *State v. Cameron*,<sup>7</sup> where a demurrer to an indictment had been sustained by the trial court and the case was in the Supreme Court on a bill of exceptions by the prosecuting attorney, the court said at page 219:

We are all agreed that the State might have prosecuted an appeal in this case for a reversal of the judgment below, there having been no jeopardy.

In *State v. Kassay*,<sup>8</sup> a case involving similar facts, the court said at page 181:

It was stated in the opinion in the Cameron case that, in all cases where the defendant has not been placed in jeopardy, error might be

<sup>2</sup> 126 Ohio St., 177 (1932).

<sup>3</sup> 89 Ohio St., 214 (1914).

<sup>4</sup> 17 C.J. 41; 8 R.C.L. 168.

<sup>5</sup> *State v. Buchanan*, 9 Am. Dec., 630 (Md., 1822); *Com. v. McKisson*, 11 Am. Dec., 630 (Penna., 1822); *Comm. v. Capp*, 48 Penna., 53 (1864); *State v. Robinson*, 37 La. Ann., 673 (1885); *State v. Lee*, 30 Atl., 1110 (Conn., 1894).

<sup>6</sup> *State v. Simmons*, 49 Ohio St., 305 (1892); *Mick v. State*, 72 Ohio St., 388 (1905).

<sup>7</sup> *Cincinnati Polyclinic v. Balch*, 92 Ohio St., (1915).

<sup>8</sup> *Ibid.*

prosecuted to the Court of Appeals from a judgment. No error could have been prosecuted, of course, from a judgment entered after the defendant was placed in jeopardy . . . We agree that error might have been prosecuted in this case, since it appears that Kassay had not yet been placed in jeopardy.

There is dictum in another Supreme Court case, *State v. Whitmore*,<sup>9</sup> intimating that this could not be done. There the court, in considering the constitutionality of the statute providing for bills of exceptions by the prosecuting attorney directly to the Supreme Court from the trial court, said at page 383:

Without the legal machinery provided for in this section (i.e., the section providing for bills of exception by the prosecuting attorney to the Supreme Court) the state was powerless to review questions of law where the accused was discharged from custody upon one of the interlocutory pleas or in case of acquittal. The law announced by the trial court however erroneous and outrageous, in the absence of this statute, constituted the law of the case, for it was the last word of the court under such circumstances.

The apparent conflict in these statements seems reconcilable if the remarks in the Whitmore case are confined to a situation in which under the prevailing notion of jeopardy, a person has been in jeopardy, and the state wants some controverted point of law settled. In that case unless the statute under consideration in the Whitmore case were valid, the state would be left remediless for even under the dicta of the Cameron case and the Kassay case the state could not then file a petition in error in the Court of Appeals.

This attempted reconciliation draws further strength from the fact that the judge who wrote the opinion in the Whitmore case had concurred in the Kassay case, the two being recorded in the same volume. Had he intended to overrule what was said in the Kassay case, surely he would have said so. Instead he said specifically he approved the Cameron case and the Kassay case.

There are three reported cases in the Court of Appeals on the question. In *State v. Blair*, it was held that the state did have a right to file a petition in error in the Court of Appeals seeking a reversal of the judgment when the defendant's demurrer to the indictment had been sustained.

<sup>9</sup> 126 Ohio St. 381 (1933).

<sup>10</sup> 24 Ohio App. 413 (1927).

In *State v. Kondak*,<sup>11</sup> the court was considering a petition in error by the state in a case in which the trial court acting under authority conferred by statute, had, after the jury found the defendant guilty of first degree murder, modified the verdict by finding the defendant guilty of second degree murder. The court held that reading of Article IV, Section 6 of the Constitution alone would seem to confer jurisdiction on it to hear the petition in error, but that Article I, Section 10, providing that no person shall be twice placed in jeopardy for the same offense was a restriction on the first named section, and that, therefore, the petition in error could not be filed because a reversal would place the defendant in jeopardy a second time.

In *State v. McNary*, the defendant had, in the trial court, demurred to the indictment, and the demurrer was overruled. The jury was impanelled, and five witnesses had testified for the state, when the court sustained the defendant's demurrer to the indictment which had been repeatedly renewed. The prosecutor filed in the Court of Appeals a petition in error which the defendant moved to dismiss on the ground that the court had no jurisdiction. The court, holding that it had jurisdiction, that the defendant had not been in jeopardy, and that the indictment was good, reversed the judgment of the Common Pleas Court.<sup>12</sup>

The case was certified to the Supreme Court as being in conflict with *State v. Kondak*, *supra*. The Supreme Court found that the indictment was not good, and affirmed the judgment of the Common Pleas Court, expressly leaving open the question of jurisdiction of the Court of Appeals to hear the case.<sup>13</sup> Two judges dissented, one holding that the indictment was good and that the defendant would not be placed twice in jeopardy by being now tried.<sup>14</sup>

It would seem from the above cases that the Court of Appeals has in some instances jurisdiction to hear a petition in error by the state, and that this is limited, under the prevailing concept of jeopardy, by the provision that no person shall be

<sup>11</sup> Ohio App., 422, (1933).

<sup>12</sup> 16 Abs., 215, (1934).

<sup>13</sup> *McNary vs. State*, 128 Ohio St., 497 (1934).

<sup>14</sup> It was intimated in *State v. Kassay*, *supra*, that the Supreme Court can have no jurisdiction to pass on the merits of a case arising in the common Pleas Court unless the case comes to it through the Court of Appeals, and that the Supreme Court has no jurisdiction unless the Court of Appeals has it. If that is true, it is difficult to see how in the McNary case the Supreme Court could pass on the merits of the indictment without deciding whether the Court of Appeals had jurisdiction to pass on the indictment.

twice placed in jeopardy for the same offense. This leads to a consideration of jeopardy.

## II. WHEN DOES JEOPARDY ATTACH IN OHIO?

Whatever its origin may have been, the doctrine that no person shall be twice placed in jeopardy for the same offense is now different from the doctrine of *res adjudicata*. The latter does not prevent the correction of errors prejudicial to either party by a reviewing court. The former does prevent such correction when the errors are prejudicial to the state. This double jeopardy doctrine developed from the harsh criminal law existing in England several centuries ago. Humane judges fostered many technicalities to mitigate the harshness of the law. We no longer have any such harsh criminal law. The reason for the doctrine has ceased, yet the doctrine is firmly embedded in our thinking about the criminal law. If we should re-examine the doctrine, we might find considerable merit in the arguments of Mr. Justice Holmes, expressed in his dissenting opinion in *Kepner v. U. S.*<sup>15</sup> He says at page 134:

. . . Logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree . . . or, notwithstanding their agreement and verdict, if the verdict is set aside on prisoner's exceptions for error in trial.

If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake in law in his favor, than he would when retried for a mistake that did him harm.

That line of thought would make the double jeopardy doctrine approximate the doctrine of *res adjudicata* in non-criminal actions. Such a thing might effect a much needed reform in the criminal law, but the old notion of what constitutes double jeopardy is too deeply embedded in the legal thought of the

<sup>15</sup> 195 U.S., 100 (1904).

country to expect a very immediate change. If there is any change, it will probably be gradual.

The general rule is that a person is in legal jeopardy when he is put on trial after proper arraignment and plea, before a court of competent jurisdiction on an indictment or information which is legally sufficient in form and substance to sustain a conviction, and a legally constituted jury has been charged with his deliverance. And he cannot thereafter be placed in jeopardy again.<sup>16</sup> There are many exceptions to this rule. Where the defendant has consented to the discharge of the jury; or has been guilty of such fraud in respect to the conduct of the trial that he was in no real peril; or where the illness of the judge or the prisoner, or the ending of the term before verdict, or the inability of the jury to agree requires the discharge of the jury, the defendant may be subjected to another trial.<sup>17</sup>

It is submitted that even under the present Ohio law as to jeopardy, the defendant was not in jeopardy in either the McNary case or the Kondak case. In the McNary case the trial did not continue and the jury was discharged because the defendant had demurred to the indictment. He may reasonably be said to have consented to the discharge of the jury. In the Kondak case the defendant moved for a new trial after the jury had found him guilty of first degree murder. Instead of granting the new trial the court modified the verdict by finding him guilty of second degree murder. The defendant did not get all he asked for in the motion for new trial. Had he got all he asked, i.e., a new trial, he could not have pleaded double jeopardy as a bar to this trial. It does not seem that he should be in a better position to plead double jeopardy when he got less than he asked for. It seems reasonable that if the Court of Appeals had found the trial court in error in modifying the verdict, the verdict could be reinstated, and that this would not impose a double jeopardy on the defendant.

### III. MAY THE PROSECUTING ATTORNEY FILE A BILL OF EXCEPTIONS IN THE SUPREME COURT DIRECTLY FROM THE TRIAL COURT?

A discussion of Section 13446-4, General Code, fits logically into any consideration of the criminal review allowed in

<sup>16</sup> 12 Ohio Jur., 196; 8 R.C.L., 138.

<sup>17</sup> *State v. Mitchell*, 42 Ohio St., 383 (1884).

Ohio at the instance of the state. The predecessor of this statute was passed in 1869. It provided that the prosecuting attorney or attorney general might except to a decision of the trial court, and, with the consent of the Supreme Court, might file in that court a bill of exceptions for the purpose of getting an authoritative decision on a questioned point of law. If the consent of the Supreme Court was obtained, counsel opposing the bill of exceptions would be appointed by, and would represent, the trial court. The defendant would not be represented since a reversal would not affect his rights, the proceeding being merely to secure an authoritative declaration of the law.

The validity of this statute was not questioned until after the adoption of the constitutional amendments of 1912. In a case arising before 1912, but decided in 1913, the court found it necessary to call the power conferred by this statute an exercise of the appellate judicial power of the court.<sup>18</sup> In the first case arising after 1912, the validity of the statute was attacked. It was contended that since the constitution now conferred jurisdiction on the Supreme Court, this statute attempting to do the same thing was invalid. The court held, however, that this was not repugnant to the constitution, but rather in accord with it, that it did not confer appellate jurisdiction, but rather provided for appellate procedure.<sup>19</sup>

In 1929 the statute was repealed and reenacted under another section number, providing in addition that the decision of the court would affect the judgment below when a demurrer, motion to quash, a plea in abatement, or a motion in arrest of judgment was passed on.<sup>20</sup> This amended statute has been considered in *State v. Kassay*,<sup>21</sup> *State v. Whitmore*,<sup>22</sup> and *State v. Ponticos*.<sup>23</sup> In the Kassay case it was held that the amended part of the statute was invalid as conferring jurisdiction on the court. But two judges thought that part was separable from the old re-enacted part, which they held to be valid, and, under the provision of Article IV, Section 2 of the Ohio Constitution, requiring the concurrence of all but one of the judges to declare a law constitutional, the statute was held constitutional. It was said in the majority opinion that a non-judicial duty was con-

<sup>18</sup> *State v. Cox*, 87 Ohio St., 313 (1913).

<sup>19</sup> *State v. Cameron*, supra, note 7.

<sup>20</sup> 113 Ohio Laws, 193.

<sup>21</sup> See note 8.

<sup>22</sup> See note 9.

<sup>23</sup> 126 Ohio St., 431 (1933).

ferred on the court similar to the duty to determine election contests and to advise the attorney general in the enforcement of charitable trusts, which duties had been conferred by the legislature and accepted by the court without question. In the Whitmore case, two judges alone upheld the validity of the statute, the remaining five thinking it invalid. In the Ponticos case it was said that a majority of the court thought the statute invalid, but not the necessary six. Whether the members of the court who thought the statute invalid thought the new part alone was invalid, but that it could not be separated from the valid part, or whether they thought the whole of the law was invalid, is not reported. It seems, however, that the fact that the re-enacted part was the law for over half a century is convincing evidence that the legislature would have passed the valid part without the invalid. If these members think the whole of the law is unconstitutional as conferring appellate jurisdiction on the court, it would seem that the answer given in the Kassay case is adequate. The court performs other non-judicial functions. Let this be one of them.<sup>24</sup>

The validity of the statute still remains in question due to changes in the personnel of the court. Of the present court only one judge is on record as thinking the statute valid, whereas three are on record as thinking it invalid.

That there is nothing to be done after the decision is rendered should not be important. The federal courts have in cases of great public importance rendered decisions in cases after the controversy between the parties was stopped. The validity of the Sherman Anti-Trust Act was determined after the particular combination involved in the suit had dissolved.<sup>25</sup> The validity of a public utility rate ordinance was determined after the effective period of the ordinance had passed.<sup>26</sup> Many states have declaratory judgment statutes the validity of which has been sustained.<sup>27</sup>

<sup>24</sup> If this statute is held invalid because it deprives the Court of Appeals of jurisdiction, it would be possible under the constitution for the courts to hold that the Court of Appeals has jurisdiction to review all criminal judgments and that the inhibitions of the provision against double jeopardy, whatever they may be, apply only to a retrial, and not to a review of the law involved in the case. Hence a declaration of the law could ultimately be obtained from the Supreme Court via the Court of Appeals, though the defendant might not be retried.

<sup>25</sup> *U. S. v. Trans-Missouri Freight Assn.*, 166 U.S., 290 (1897).

<sup>26</sup> *Boise City Irrigation and Land Co. v. Clark*, 131 Fed. Rep., 415 (1904).

<sup>27</sup> Borchard, *Constitutionality of Declaratory Judgments*, 31 Columbia Law Review, 561.



The statute furnishes a quick and convenient method of getting an authoritative determination of the criminal law of the state which might otherwise remain in question for years with the result that the administration of justice might be considerably hampered. It is not unduly burdensome on the court, because the court is authorized to retain and pass upon the bill in its discretion.

If the notion of what constituted jeopardy contended for by Mr. Justice Holmes, *supra*, were adopted there would be little necessity for such a statute, but since we cannot reasonably expect that view to prevail for some time, this statute can still be of some assistance to the state in the administration of criminal law, if its validity is upheld.